

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2010100312

ORDER FOLLOWING PRE-HEARING  
CONFERENCE, DEFERRING RULING  
ON MOTION TO DISMISS AND  
GRANTING REQUEST TO  
UNEXPEDITE ISSUE NO. 5

On October 28, 2010, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Troy Taira, Office of Administrative Hearings (OAH). Mother appeared on behalf of Student. Damara Moore, Attorney at Law, appeared on behalf of San Francisco Unified School District (District). The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Motions

*Motion to Dismiss Complaint due to lack of standing to file complaint.*

Mother filed a request for due process hearing (complaint) on October 6, 2010. On October 22, 2010, District filed a motion to dismiss the complaint alleging Mother did not hold Student's educational rights. Student's parents are divorced. Student's complaint listed his physical address in San Francisco. Mother listed her address in Modesto. On October 25, 2010, Mother filed a copy of an order from Stanislaus County Superior Court, in case number 171664, dated March 4, 2009, indicating that Student's parents had joint legal and shared physical custody. The court order stated that the matter was continued to April 8, 2009. Mother stated during the PHC that by mutual agreement, Student went to live with his father in San Francisco in June 2010. Mother continues to live in Modesto. At the PHC, Mother indicated she had additional documents to show current custody. The undersigned ALJ ordered Mother to provide that proof by noon on October 29, 2009, to permit the ALJ to fully review the evidence and issue an order on the motion to dismiss. The ALJ also allowed District to submit a response by 3:00 p.m. on October 29, 2010.

APPLICABLE LAW

The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free

appropriate public education” (FAPE), and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.)

According to the California Education Code the term “parent” can be defined many ways. This is to ensure that children’s rights are protected and not defeated because of an unusual parenting situation. When there is more than one biological parent, they are both presumed to be “parent” unless the biological parent does not have legal authority to make educational decision for the child. (Ed Code §56028, subd. (b)(1)).

A party has the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

OAH does not have jurisdiction to entertain claims by a person who does not hold the Student’s education rights. In that same vein, OAH cannot resolve a custody issue or determine the holder of educational rights, as that request is better suited for a Family Court.

## DISCUSSION

Mother asserts that she holds Student’s educational rights because she successfully enrolled him in District’s school and because OAH’s initial scheduling order of October 11, 2010, listed the names of both parents. Those are administrative matters that, alone, do not establish the legal status of custody or educational rights in response to a motion challenging the standing to file a due process complaint. Mother argues that the order from Stanislaus County Superior Court in case number 171664, dated March 4, 2009, establishes that she has joint legal custody. However, the court order continued the case to April 8, 2009. After the PHC, Mother submitted a copy of another order from Stanislaus County Superior Court in case number 171664, dated April 8, 2009, indicating that Student’s parents had joint legal and shared physical custody. However, this order states that the matter was continued to August 10, 2009.

District challenged the Mother’s status as the holder of Student’s educational rights. Mother has provided two custody orders, the most recent order dated April 8, 2009, both of which continued the case to future dates. Since the order of April 8, 2009, Student’s physical custody has changed. Since June 2010, Student as been living with his father in San Francisco. This raises factual questions regarding whether there has been a change in the Parents’ custody rights by court order or mutual agreement between April 2009 and June 2010.

OAH does not have jurisdiction to hear a matter without a definitive showing that Mother holds the education rights. Mother's statement that she is the primary caretaker, was able to register Student in school, and that both parents' names were on the scheduling order, are not specific enough to deem her to be the holder of educational rights. That is a decision that must be made in a Family court setting. The court orders submitted by Mother do not conclusively show if Mother currently holds legal custody. It remains uncertain if Mother currently has legal custody sufficient to bring this action. OAH retains jurisdiction of this case pending resolution of the standing issue. Mother shall submit additional documentation or sworn declaration(s)<sup>1</sup> to show the status of legal custody by November 3, 2010, at 12:00 p.m. Failure to provide sufficient documentation on this issue by the specified date and time will result in dismissal of the claim. District may submit a response by November 4, 2010, at 12:00 p.m.

#### *Request to Unexpediate Hearing*

On October 20, 2010, OAH bifurcated Issue 5 of the complaint and set the issue for an expedited hearing on November 2, 2010. During the PHC, the parties jointly stipulated that there was no basis to expedite this issue.

#### APPLICABLE LAW

A child with a disability has procedural rights when faced with a change in educational placement caused by a violation of a code of student conduct. (34 C.F.R. §§ 300.530, 300.532, 300.536 (2006).) Within 10 school days of a decision by a school district to change the placement of a child with a disability based upon a violation of a code of conduct, the district must convene an Individualized Educational Program (IEP) meeting with the purpose of determining whether the conduct was a manifestation of the student's disability. (34 C.F.R. § 300.530(e)(2006).) If the IEP team determines that the conduct was not a manifestation of the disability, then the school district may apply relevant disciplinary procedures applicable to children without disabilities, except that the district must continue to provide educational services and, when appropriate, perform a functional behavioral assessment of the student. (34 C.F.R. § 300.530(c), (d)(i), (ii) (2006).) If the IEP team determines that the conduct was a manifestation of the disability, then the school district must conduct a functional behavioral assessment or review an existing behavioral intervention plan, and return the student to his or her educational placement, unless special circumstances apply. (34 C.F.R. § 300.530(f)(1) (2006).)

A parent of a child with a disability who disagrees with any decision by a school district regarding a change in educational placement of the child based upon a violation of a code of student conduct, or who disagrees with a manifestation determination conducted by

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<sup>1</sup> A sworn declaration is a written statement under oath swearing to the truth of the matter asserted. For example, Mother may submit a sworn declaration from Father stating that Mother holds Student's educational rights.

the district, may request and is entitled to receive an expedited due process hearing. (34 C.F.R. § 300.532(a)(2006).) The procedural right that affords the parties an expedited due process hearing is mandatory and does not allow OAH to make exceptions. (34 C.F.R. § 300.532(c)(2).) In such event, “[T]he [state education agency] SEA or [local education agency] LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed.” (34 C.F.R. § 300.532(c)(2) (2006).) In California, OAH is the hearing office that assumes this responsibility for the California Department of Education. (Ed. Code, § 56504.5, subd. (a).)

## DISCUSSION

Since OAH is retaining jurisdiction of this case pending resolution of the standing issue, it has the authority to unexpedite the previously expedited portions of this case. On October 20, 2010, OAH bifurcated Issue 5 of the complaint and set the issue for an expedited hearing on November 2, 2010. During the PHC, the parties jointly stipulated that there was no basis to expedite this issue. The parties established that there is no expulsion or disciplinary proceedings, no change in placement based on a code of conduct violation, or any other basis for expediting the issue. Therefore, OAH is unexpediting Issue 5 of the complaint. Accordingly, the expedited hearing in this matter is vacated.

## ORDER

1. Mother shall submit additional documentation or sworn declaration(s) to show the status of legal custody by November 3, 2010, at 12:00 p.m. Any document Mother files with OAH shall also be sent to District. District may submit a response on this issue by November 4, 2010, at 12:00 p.m.

2. Issue 5 of the complaint is unexpedited. The expedited hearing date on November 2, 2010, is vacated.<sup>2</sup>

3. All other dates remain as scheduled.

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<sup>2</sup> District renewed its request for a determination of sufficiency on Issue 5 of Parent’s complaint. OAH’s Order of October 20, 2010, did not address the sufficiency of Issue 5 due to its expedited nature. Now that the issue is unexpedited, Mother may include Issue 5 in an amended complaint pursuant to the sufficiency determination. Mother has indicated she intends to file an amended complaint. District may file a Notice of Insufficiency as to the amended complaint at that time.

IT IS SO ORDERED.

Dated: October 29, 2010

/s/

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TROY TAIRA  
Administrative Law Judge  
Office of Administrative Hearings